Supreme Court, U.S.
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No. 79-1920

IN THE

Supreme Court of the United States

October Term, 1979

SAFEWAY STORES, INC., *et al.*,

Petitioners,

vs.

MEAT PRICE INVESTIGATORS ASSOCIATION, *et al.*,

Respondents.

BRIEF OF RESPONDENT-PLAINTIFFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

Does the decision of the United States Supreme Court in *Illinois Brick Co. v. Illinois,* 431 U.S. 720 *rehearing denied,* 434 U.S. 881 (1977) so narrowly limit the application of Section 4 of the Clayton Act, 15 U.S.C. §15, that the primary producers of fat cattle, as *sellers* of a fungible commodity to packers and slaughterers for an artificially depressed price, are precluded from recovering damages arising from sales into an inelastic market which is allegedly rigged by the supermarkets, the supermarkets' trade association, a beef-commodity reporting service and other unnamed co-conspirators in violation of the federal antitrust laws?

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IN THE

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No. 79-1920

SAFEWAY STORES, INC., *et al.*,

Petitioners,

vs.

MEAT PRICE INVESTIGATORS ASSOCIATION, *et al.*,

Respondents.

BRIEF OF RESPONDENT-PLAINTIFFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent-plaintiffs, fat cattle producers and feeders, respectfully pray that this Court deny the Petition of Safeway Stores, Inc., *et al.* for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit and grant only respondents' (Meat Price Investigators Association *et al.*, and Ronald Becker, *et al.*) Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, No. 79-1959.

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. §1, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

Section 2 of the Sherman Act, 15 U.S.C. §2, provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 4 of the Clayton Act, 15 U.S.C. §15 provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the

United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

INTRODUCTION

Respondent-plaintiffs to this Petition for a Writ of Certiorari by these petitioners, Safeway Stores, Inc., *et al.*, filed their own Petition for a Writ of Certiorari, No. 79-1959, captioned *In re Beef Industry Antitrust Litigation*, M.D.L. No. 248, *Meat Price Investigators Association, et al. vs. Safeway Stores, Inc., et al.* and *Ronald Becker, et al. vs. Safeway Stores, Inc., et al.* Respondent-plaintiffs petitioned in No. 79-1959 for a writ on the grounds that *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968) (hereinafter referred to as *Hanover Shoe*) and *Illinois Brick Co. v. Illinois*, 431 U.S. 720, *rehearing denied*, 434 U.S. 881 (1977) (hereinafter referred to as *Illinois Brick*) do not bar the *primary sellers* of a fungible commodity from recovering damages for the losses sustained as a direct result of sales into a market that has allegedly been rigged by the supermarkets, the supermarkets' trade association, a beef-commodity reporting service and other unnamed co-conspirators.

Assuming *arguendo* that the use of the "pass-on theory of damages" as announced in *Hanover Shoe* and *Illinois Brick* is held to be applicable to primary sellers into a conspiratorially rigged market, the respondents herein advocate, in the alternative, that the Court of Appeals for the Fifth Circuit correctly held that the present cause falls within those actions which are excepted from *Illinois Brick*.

Respondents here reserve the right to plead this cause in the alternative in this Petition without losing their right to plead the inapplicability of *Hanover Shoe* and *Illinois Brick* to the fact situation existing in these causes of action.

STATEMENT OF THE CASE

The causes of action involved in this Petition are antitrust actions brought by fat cattle producers and feeders, respondent-plaintiffs herein, against numerous large supermarket chains, the supermarkets' trade association (formerly known as the National Association of Food Chains and now known as the Food Marketing Institute), a beef-commodity reporting service (known as the National Provisioner, Inc., publisher of The National Provisioner Daily Market and News Service, which is commonly known as the "Yellow Sheet"), petitioner-defendants herein, and other unnamed co-conspirators. The complaints allege that the concerted activities of these defendants, together with the activities of the unnamed co-conspirators, violate the provisions of Sections 1 and 2 of the Sherman Antitrust Act (15 U.S.C. §§ 1-2), and damaged the plaintiffs (respondents herein) by artificially depressing the fair market price for fat cattle.[1] Paragraphs 25-34 of the Amended and Substituted Complaints in *MPIA* and *Becker*, Appendix ("App.") at A-13—A-18 and A-39—A-41.

The complaints, as amended, are brought by the respondent-plaintiffs for damages and for injunctive relief, under Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26).

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[1] The agricultural census figures compiled by the U.S. Department of Agriculture for the early 1970's indicate that approximately 81% of all fat cattle is marketed in the United States in 11 of these states by approximately 20% of the producers of fat cattle.

On June 17, 1977, petitioner-defendants filed Motions for dismissal and for Judgment on the Pleadings under Rules 12(b)(6) and 12 (c) of the Federal Rules of Civil Procedure predicated primarily upon the decision in *Illinois Brick*. The Trial Court entered its Order of Dismissal on the Rule 12(b) Motion, basing its reasoning on the policy decision enunciated in *Illinois Brick*. The District Court's Final Order was entered December 9, 1977, dismissing these actions with prejudice. App. A-1.

The plaintiffs appealed, in a timely fashion, to the United States Circuit Court of Appeals for the Fifth Circuit. On August 17, 1979, that Court entered judgment, reversing and remanding all the consolidated appealed cases to the District Court for the Northern District of Texas for further proceedings. *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979). The mandate was stayed until July 9, 1980. The Circuit Court:

(1) agreed with the District Court that the policy decision announced in *Illinois Brick* applies to an indirect producer-seller, but held that a producer-seller forced to sell into a rigged market could maintain a civil antitrust action on a "functional equivalent" to a "cost-plus exception" to *Illinois Brick*;

(2) affirmed the District Court's holding that the Amended and Substituted Complaints failed to allege a co-conspiracy between supermarkets, the chain stores, the supermarkets' trade association and a beef-commodity reporting service, and the packers and slaughterers; and

(3) held that the District Court did not err in sustaining defendants' Rule 12(b) Motion to Dismiss with Prejudice and in denying plaintiffs' request for leave to amend under Rule 15, Federal Rules of Civil Procedure.

REASONS WHY THIS PETITION FOR A WRIT OF CERTIORARI SHOULD NOT BE GRANTED

I. The Policy Decision Announced in *Illinois Brick* Applies Only to Direct Purchasers Who Have Been Penalized by an Overcharge.

The petitioner-defendants over-generalize the holdings of the United States Supreme Court in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968) and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 *rehearing denied*, 434 U.S. 881 (1977) by attempt to broadly apply the holdings of those cases to sellers (Pet. at 2) and by their bold assertion that "'pass-on claims' or defenses are not permitted" (Pet. at 5). *Hanover Shoe* held, *inter alia*, that a manufacturer could not assert a "pass-on theory of damages" defense against a direct *purchaser* who *paid* an *overcharge*. *Illinois Brick* held, *inter alia*, that an indirect *purchaser* could not use a "pass-on theory of damages" offensively to recover *overcharges paid*.

Respondent-plaintiffs' complaints allege, however, that respondent-plaintiffs are damaged, not by the *payment* of *overcharges*, but by the inadequate price that they received because the *market was artificially depressed* through the activities of the petitioner-defendants, and other unnamed co-conspirators, in violation of the federal antitrust laws. Neither *Hanover Shoe* nor *Illinois Brick* deals with—or even refers to—*first sellers* of fungible commodities into a *conspiratorially rigged market* for an *artificially depressed* price. *See Florida Power Corp. v. Granlund*, 78 F.R.D. 441 (M.D. Fla. 1978).[2]

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[2] In response to plaintiffs' characterization of the holding if *Illinois Brick* as "the direct purchaser of a price-fixed product is the only proper party to recover for the overcharges on that product," the District Court stated:

II. These Causes of Action Pose No Apportionment of Damages Problems Among Various Levels of the Market.

The respondent-plaintiffs' causes of action do not present the problems of proof or of administrative complexity that are addressed in *Hanover Shoe* and *Illinois Brick*.

The Amended and Substituted Complaints allege that plaintiffs have suffered, among other things, a "[l]oss of revenues measured by the difference between the artificially depressed price received by plaintiffs . . . and the price they would have received had free market conditions existed." App. at A-23. Because there is no allegation of an overcharge to the middlemen by defendant supermarkets, there is no opportunity for defendants to assert a pass-on of damages defense. Indeed, should there be an assertion of the "pass-on of damages theory" by the named defendants in this cause, said defendants would place themselves in the astounding posture of defending the action by asserting that they did not pay adequate consideration for their supplies of beef.

These causes of action pose no apportionment problem because no *overcharge* has been *paid*. The allegations of the Amended and Substituted Complaint assert an artificially depressed market price for fat cattle. Amended and Substituted Complaint, paragraph 34, App. at A-16. In contrast, the problem addressed by this Court in *Illinois Brick* is what might be termed a "trickle down" problem—a problem of tracing the overcharge to and overpayment by a direct purchaser

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> Closely examined, the proposition proves too much. It would immunize from antitrust liability any manufacturer who conspired with his suppliers to fix the price of the supplied raw material. *Illinois Brick* does not mention, let alone discuss, such a situation.

Id. at 443.

through successive levels of overcharge and overpayment where, at any of the several levels, all or part of the damages suffered by reason of the *payment* of the overcharge might be absorbed by the payor. In this action, however, there is no "trickle down". The cattlemen, who are selling their perishable product at a conspiratorially depressed price into an artificially depressed market which, in short term is inelastic, can neither recoup or pass-on any loss they suffer nor make up that loss by passing on an overcharge because they are the *first sellers* into the rigged market. Therefore, any apportionment of damages will be only among the *first sellers into* the conspiratorially depressed market—not, as in *Illinois Brick*, among successive levels of the market itself.

III. The Injury Alleged in These Causes of Action Arises Out of the Conspiratorial Depression of the Price of Fat Cattle in the General Market.

The Court of Appeals accurately recognized:

> The plaintiffs' theory of damages is not in all respects a pass-on type of theory. Their theory, stated most broadly is that the activities of the alleged price-fixing conspiracy depressed wholesale prices generally, and not simply the prices paid by members of the conspiracy, and that packers and slaughterers based their purchases of live cattle on the depressed wholesale price. It is immaterial whether or not a steer purchased from a plaintiff found its way into the hands of a conspirator retailer. It is enough if, as alleged, the conspirators' activities caused a general depression in wholesale prices and the intermediary purchasing from a plaintiff based his pricing decision on the depressed wholesale beef price.

In re Beef Industry Antitrust Litigation, 600 F.2d 1148, 1166 n.24 (5th Cir. 1979).

The respondent-plaintiffs are damaged because the free market forces have been superseded by the illegal activities of the petitioner-defendants and the other unnamed co-conspirators.[3] Indeed, the respondent-plaintiffs are damaged because the general market for their fungible commodity is illegally depressed—not because they paid an overcharge to a middleman.

This Court has recognized the seriousness of monopsony or oligopsony power at the dominant position of the market place. If a violation of the antitrust laws occurs in this critical position, the entire marketplace is directly affected and injured. As this Court noted in *United States v. Patten*, 226 U.S. 525 (1912), with regard to allegations concerning the defendant's alleged "cornering" of the cotton market:

> It well may be that running a corner tends for a time to stimulate competition; but this does not prevent it from being a forbidden restraint, for it also operates to *thwart the usual operation of the laws of supply and demand*, withdraw the commodity from the normal current of trade, to enhance the price artificially, to hamper users and consumers in satisfying their needs, and to produce practically the same evils as does the suppression of competition. *Id.* at 542. Emphasis added.

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[3] *See Reiter v. Sonotone Corp.*, Trade Reg. Rep. (CCH) ¶63,212 (1980) *appeal denied* Misc. No. 80-8058 (8th Cir. May 23, 1980) ("When the manufacturers and retailers conspire to fix the prices . . . such competition is foreclosed and the market is no longer competitive. Such price-fixing activities by manufacturers and retailers is a per se violation of Section 1 of the Sherman Act." and further "Because the purchaser, including the plaintiff herein . . . is paying the overcharge directly, no assertion that an overcharge has been passed on to it from another injured party will be necessary to prove the alleged damages.")

In another monopsony case, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), this Court again recognized that a conspiracy, which exists in that position of the market where a commodity is purchased and put into the stream of commerce is the critical position of the entire market. "And those who [are] in that strategic position would have it in their power to destroy or drastically impair the competitive system." *Id.* at 221.

Therefore, a violation of the antitrust laws by those persons who stand in this key position in the market creates not just an individualized injury, which occurs when there is an overcharge passed through a chain of distribution to an ultimate consumer as in *Illinois Brick*, but creates an injury which permeates the entire market, "directly interfering with the free play of market forces." *Socony-Vacuum*, 310 U.S. at 221. In the present cause, plaintiffs have alleged that defendants have conspired to restrain trade in the entire market for the production, slaughter and purchase of fat cattle. Defendants have chosen as their tool for the manipulation of this market, the price they have agreed to pay for fresh processed carcass beef produced from fat cattle. Defendants, who occupy a key position in the market, were therefore able to manipulate and to conspiratorially rig the entire market which is inelastic in the short-term and into which plaintiffs were forced to sell their live fat cattle.

While recognizing that plaintiffs claim damage to the market in general and that "(3) [plaintiffs] sold their livestock for less than they would have in the open and competitive market," the Fifth Circuit Court of Appeals held that *Illinois Brick* was of such general application that it applied to circumstances where the market was allegedly manipulated by use of price and where the defendants monopolized and attempted to monopolize said market by use of illegal pricing

practices. The purpose of the federal antitrust laws is to regulate and protect competition. *Mandeville Is. Farms v. American C. S. Co.*, 334 U.S. 219, 243 (1947); *Fontana Aviation, Inc. v. Cessna Aircraft Co.*, 617 F.2d 478 (7th Cir. 1980). Surely this Court did not intend *Illinois Brick* to thwart the Congressional scheme of regulation and protection by barring recovery of damages by those persons injured in their business or property where the free market forces are conspiratorially and illegally controlled through the use of illegally depressed pricing.

IV. As the First Sellers Into the General Market, the Respondent-Plaintiffs Will Ensure the Vigorous Enforcement of the Federal Antitrust Laws.

In *Illinois Brick*, the Supreme Court determined that, as a matter of policy, the protection of competition through the vigorous enforcement of the federal antitrust laws is best served if only direct *purchasers* are allowed to recover treble damages for *overcharges paid* by those purchasers. The quality and quantity of the interest of the plaintiffs in these causes of action differ, however, from those of the plaintiffs in an *Illinois Brick* context. In a cause of action to recover overcharges paid by purchasers, the potential plaintiffs are an amorphous mass of ultimate consumers whose members may have made as little as one purchase of an overpriced product. In contrast, these plaintiffs are an identifiable group of primary producers who earn their livelihood through the sale of their fungible commodity into the general market. The damages suffered by the primary producers in the present cause are not caused by an individualized injury; their damages arise from the demise of a free and competitive market where price is illegally depressed. Because these plaintiffs

are primary sellers into this market, they have a continuing interest in ensuring that the market remains free and competitive through the vigorous enforcement of the federal antitrust laws.

CONCLUSION

For each of the foregoing reasons, respondent-plaintiffs respectfully request that the Writ of Certiorari be denied.

Respectfully submitted,

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Dated: August 20, 1980.

CERTIFICATE OF SERVICE

The undersigned, a member of the bar of the United States Supreme Court has caused to be served the within Brief of Respondent-Plaintiffs in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and Appendices thereto upon all Plaintiffs Counsel of record and upon all Defendants Counsel of record in these proceedings contained within the most recent Liaison Counsel and attorneys list.

Respectfully submitted,

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Dated: August 20, 1980.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In Re:
BEEF INDUSTRY ANTITRUST LITIGATION

MDL Docket No. 248
This Matter Relates to:
CA 3-75-0702-C (Pony Creek)
CA 3-76-1237-C (Agee) 6
CA 3-76-1238-C (MPIA)
CA 3-76-1244-C (Lowe)
CA 3-76-1248-C (Black)
CA 3-76-1253-C (Chaparral)
CA 3-76-1254-C (Petersen)
CA 3-76-1255-C (Boccardo)
CA 3-76-1361-C (Becker)
CA 3-76-1470-C (Varian)
CA 3-77-0360-C (Becker-DC)
CA 3-77-0361-C (MPIA-DC)

ORDER

The Court in its letter of October 19, 1977, informed the parties in the above causes that it would strike the retail price fixing allegations of the plaintiffs and dismiss plaintiffs' complaints on the basis of *Illinois Brick Co. v. Illinois*, —— U.S. ——, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), *rehearing denied*, 46 U.S.L.W. 3220 (U.S., Oct. 3, 1977) (No. 76-404).

It is therefore ORDERED that the allegations listed in Appendix A to this Order are dismissed and stricken from such complaints.

It is further ORDERED that CA 3-76-1238-C, CA 3-76-1254-C, and CA 3-76-1361-C, upon the motions of the defendants, are dismissed with prejudice for failure to state a claim upon which relief can be granted.

It is further ORDERED that upon the Court's own motion that CA 3-75-0702-C, CA 3-76-1237-C, CA 3-76-1244, CA 3-76-1248-C, CA 3-76-1253-C, CA 3-76-1255-C, CA 3-76-1470-C, CA 3-77-0360-C and CA 3-77-0361-C are dismissed with prejudice for failure to state a claim upon which relief can be granted.

United States District Judge

Dec. 9, 1977

APPENDIX A

PLAINTIFFS' RETAIL PRICE-FIXING ALLOCATIONS

Petersen (CA 3-76-1254-C)

Amended Complaint, Section IV, Paragraph 2(b)-(d)

Pony Creek (CA 3-75-0702-C)

Third Amended Complaint, Paragraph 12(b)

MPIA (CA 3-76-1238-C)

Amended and Substituted Complaint, Paragraphs 34(c)-(e) and 37(b)-(c)

Agee (CA 3-76-1237-C)

Amended Complaint, Section IV, Paragraphs 2(b)-(d)

Black (CA 3-76-1238-C)

Amended Complaint, Paragraphs 42b, 45b(2), 45b(4), 52, 72 and 74

Chaparral (CA 3-76-1253-C)

Complaint, Section V, Paragraphs 2(b) and 2(d)

Boccardo (CA 3-76-1255-C)
Amended Complaint, Paragraphs 57(b) and 57(d)
Becker (CA 3-76-1261-C)
Amended and Substituted Complaint, Paragraphs 34(c)-(e) and 37(b)-(c)
Varian (CA 3-76-1470-C)
Complaint, Section III, Paragraphs 15 and 24; and Section V, Paragraphs 2(b), 2(d) and 3
Becker-DC (CA 3-77-0360-C)
Complaint, Paragraph 25(b)
MPIA-DC (CA 3-77-0361-C)
Complaint, Paragraph 23(b)

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MEAT PRICE INVESTIGATORS ASSOCIATION, an Iowa unincorporated association and trust, LAVERN E. RESCHKE, DARREL KLEPPE, DEAN JACKSON, JOE MENTE, CLARENCE VOS, LYNN SHERIFF, WAYNE MEIER, DON REILLY, BILL ENO, GAY HATLE, BOB SEVERTSON, CLEM SCHROEDER, FLOYD EDGINGTON, JR., GLENN FREIE, ALLAN BERTRAM, and BYRON HAYES, Individually and as Members of the Board of Trustees of Meat Price Investigators Association; RESCHKE BROTHERS, an Illinois partnership; JACKSON FARMS, an Iowa partnership; IDLEWILD FARMS, an Iowa partnership; ENO FARMS, INC., an Iowa corporation; EDNA FEEDLOT, A Kansas partnership; and HAYES CATTLE, INC., a Missouri corporation,

Plaintiffs,

v.

SAFEWAY STORES, INCORPORATED, a Maryland Corporation; THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., a Maryland Corporation; THE KROGER CO., an Ohio Corporation; AMERICAN STORES COMPANY f/k/a ACME MARKETS, INC., a Delaware Corporation; LUCKY STORES, INC., a California Corporation; JEWEL COMPANIES, INC., a New York Corporation; WINN-DIXIE STORES, INC., a Florida Corporation; FOOD FAIR, INC., f/k/a FOOD FAIR STORES, INC., a Pennsylvania Corporation; GRAND UNION CO., a Delaware Corporation; SUPERMARKETS GENERAL CORP., a Delaware Corporation; NATIONAL TEA COMPANY, an Illinois Corporation; STOP & SHOP COMPANIES, INC., a Massachusetts Corporation; FIRST NATIONAL STORES, INC., a Massachusetts Corporation; COLONIAL STORES, INC., A Virginia Corporation; ALLIED SUPERMARKETS, INC., a Delaware Corporation; GIANT FOOD, INC., a Delaware Corporation; BORMAN'S, INC., a Delaware Corporation; PUEBLO INTERNATIONAL, INC., a Delaware Corporation; NATIONAL ASSOCIATION OF FOOD CHAINS, now, as a result of merger, known as FOOD MARKETING INSTITUTE; and NATIONAL PROVISIONER, INCORPORATED, a New York Corporation,

Defendants.

CIVIL NO. 75-333-2
In Re: Beef Industry Antitrust Litigation
M.D.L. No. 248
No. CA 3-76-1238-C
(N.D.Tex.)

AMENDED AND SUBSTITUTED COMPLAINT

Plaintiffs, as assignees and trustees of the members of Meat Price Investigators Association, by their attorneys, bring this civil action against the above-named defendants for treble the amount of damages suffered by them by reason of defendants' violation of the antitrust laws of the United States and for injunctive relief and demanding a trial by jury, complaint against the defendants and each of them, and allege as follows:

I.

JURISDICTION AND VENUE

1. This Complaint is filed and these proceedings are instituted against the named defendants for violations of §§ 1 and 2 of the Act of Congress of July 2, 1980 (26 Stat. 209), as amended (15 U.S.C. §§ 1 and 2) commonly known as the Sherman Act. This action is brought by the plaintiffs and each of them, for the members, now and hereafter, of Meat Price Investigators Association, an Iowa unincorporated association and trust, for three-fold the damages suffered by them, including reasonable attorneys fees, and for injunctive relief, under §§ 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26). This Court has jurisdiction of the subject matter pursuant to 28 U.S.C. § 1337.

2. Each of the defendants or its agents or co-conspirators maintains offices, transacts business, or is found within the Southern District of Iowa, and is within the jurisdiction of this Court for the purpose of services of process. Many of the unlawful acts done in violation of the antitrust laws, as hereinafter alleged, have been performed within the Southern District of Iowa. The interstate trade and commerce described hereinafter is carried on in part, within the Southern District of Iowa.

II.
PARTIES

PLAINTIFFS

3. The plaintiff, Meat Price Investigators Association (hereinafter "MPIA"), acting through its Board of Trustees, is an unincorporated association and an express trust organized and created in the Southern District of Iowa under the laws of Iowa for the purpose of, among other things, investigating and prosecuting this instant action. Meat Price Investigators Association presently has in excess of 450 members, all of whom have assigned their individual causes of action against these defendants to Meat Price Investigators Association, have given Meat Price Investigators Association a power of attorney in fact, and created an express trust in Meat Price Investigators Association and in its Board of Trustees as trustees, to prosecute this instant action for the individual and collective benefit and on behalf of the Association and its members. The members of Meat Price Investigators Association have fed approximately 350,000 head of cattle per year during the period of which complaint is made herein. The interests of each of the members of Meat Price Investigators Association are coincident with and not antagonistic to those of other members of the Association. The claims of each of the members involve common questions of law and fact, including *inter alia* the issues raised by the defendants' acts in violation of §§ 1 and 2 of the Sherman Act as hereinafter alleged. Claims and defenses of each of the members of Meat Price Investigators Association are typical of the claims and defenses of all members of Meat Price Investigators Association. Meat Price Investigators Association has the fiduciary duties of a trusteee under Iowa law pursuant to the power of

attorney in fact given and the express trust created by each of the members, and as such, Meat Price Investigators Association will fairly and adequately represent and protect the interests of each of its members. The members of Meat Price Investigators Association include individual proprietorships, partnerships and corporations who have raised and fed cattle during the years 1963 to present, all of whom can be identified by their membership in the plaintiff, Meat Price Investigators Association. The members reside in the states of Iowa, Illinois, Minnesota, Missouri, Nebraska, Indiana, Colorado, South Dakota, Montana, Wyoming, Idaho, Kansas, Utah and California.

4. Members of the Board of Trustees of Meat Price Investigators Association and representative plaintiffs in this cause of action are Lavern E. Reschke, doing business in a partnership called Reschke Brothers from Geneseo, Illinois; Darrel Kleppe, of Clinton, Iowa; Dean Jackson of Kellerton, Iowa, doing business in a partnership called Jackson Farms; Joe Mente of Wheatland, Iowa; Clarence Vos of Kingsley, Iowa, doing business in a partnership known as Idlewild Farms; Lynn Sheriff of Sheffield, Iowa, individually and as a partner in a dissolved partnership known as Idlewild Farms; Lynn Sheriff of Sheffield, Iowa, individually and as a partner in a dissolved partnership known as Sheriff Feed and Livestock; Wayne Meier of Hubbard, Iowa; Don Reilly of LeMars, Iowa; Bill Eno of Sheffield, Iowa, a shareholder in Eno Farms, Inc.; Gay Hatle of Meadow, South Dakota; Bob Severtson of Havre, Montana; Clem Schroeder of New Providence, Iowa; Glenn Freie of Latimer, Iowa; Floyd Edgington, Jr., of Sheffield, Iowa, doing business as an individual proprietorship in Iowa and in a Kansas partnership known as Edna Feedlot; and Allan Bertram of Ireton, Iowa;

and Byron Hayes, of Chillicothe, Missouri, doing business as a shareholder in Hayes Cattle, Inc., a Missouri corporation. Each of the above-named representative plaintiffs are and have been cattle raisers during all times material to this lawsuit.

DEFENDANTS

5. The defendant SAFEWAY STORES, INCORPORATED (hereinafter "Safeway") is a Maryland corporation with its principal office in Oakland, California. Safeway and its subsidiaries operate the largest chain of retail food stores in the United States, with more than 2400 stores, concentrated primarily west of the Mississippi River and also in the Washington, D. C. area. Safeway buys beef at wholesale and sells beef at retail.

6. The defendant THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC. (hereinafter "A&P") is a Maryland corporation with its principal office in Montvale, New Jersey. A&P and its subsidiaries operate the second largest chain of retail food stores in the United States, with more than 2,000 stores, concentrated east of the Mississippi River. A&P buys beef at wholesale and sells beef at retail.

7. The defendant THE KROGER CO. (hereinafter "Kroger") is an Ohio corporation with its principal office in Cincinnati, Ohio. Kroger and its subsidiaries operate the third largest chain of retail food stores in the United States, with more than 1,200 stores, concentrated in the mid-Atlantic, mid-Western and sourthern regions of the United States. Kroger buys beef at wholesale and sells beef at retail.

8. The defendant AMERICAN STORES COMPANY, formerly Acme Markets, Inc. (hereinafter "American Stores") is a Delaware corporation with principal offices in Wilmington, Delaware. American Stores and its subsidiaries

operate 787 retail food stores in the United States, with Acme Markets stores concentrated in the mid-Atlantic states and Alpha Beta stores concentrated in Arizona and California. These stores buy beef at wholesale and sell beef at retail. American Stores runs beef slaughtering and packing facilities which purchase cattle and supply virtually all requirements of American Stores' retail outlets as well as sell beef at wholesale to other defendant chain stores and co-conspirators.

9. The defendant LUCKY STORES, INC. (hereinafter "Lucky") is a California corporation with its principal offices in Dublin, California. Lucky and its subsidiaries operate approximately 400 retail food stores in the United States, with Lucky and Food Basket stores concentrated in California and the Western states and Eagle stores concentrated in the mid-West and Texas. Lucky purchases beef at wholesale and sells beef at retail.

10. The defendant JEWEL COMPANIES, INC. (hereinafter "Jewel") is a New York corporation with principal offices in Chicago, Illinois. Jewel and its subsidiaries operate approximately 400 retail food stores in the United States, with approximately 300 Jewel and Eisner stores concentrated in the Chicago area, approximately 60 Star stores concentrated in New England and 40 Buttrey stores concentrated in the Northwest. Jewel purchases beef at wholesale and sells beef at retail.

11. The defendant WINN-DIXIE STORES, INC. (hereinafter "Winn-Dixie") is a Florida corporation with its principal offices in Jacksonville, Florida. Winn-Dixie and its subsidiaries operate approximately 1,000 retail food stores under the names Winn-Dixie and Kwik-Chek, which are concentrated in the Southeastern United States. Winn-Dixie purchases beef

at wholesale and sells beef at retail. Winn-Dixie also runs beef slaughtering and packing plants which purchase live cattle and supply and sell beef at wholesale.

12. The defendant FOOD FAIR, INC., formerly Food Fair Stores, Inc. (hereinafter "Food Fair"), is a Pennsylvania corporation with principal offices in Philadelphia, Pennsylvania. Food Fair and its subsidiaries operate approximately 450 retail food stores concentrated in the eastern seaboard area of the United States and particularly concentrated in Florida and Pennsylvania. Food Fair buys beef at wholesale and sells beef at retail. Food Fair also operates beef slaughtering and packing plants which purchase cattle and supply virtually all of requirements of Food Fair's retail outlets as well as sell beef at wholesale to other defendant chain stores and co-conspirators.

13. The defendant GRAND UNION CO. (hereinafter "Grand Union") is a Delaware corporation with principal offices in Elmwood Park, New Jersey. Grand Union and its subsidiaries operate approximately 500 retail food stores concentrated along the eastern seaboard area of the United States and concentrated particularly in New York and New Jersey. Grand Union purchases beef at wholesale and sells beef at retail.

14. The defendant SUPERMARKETS GENERAL CORP. (hereinafter "Supermarkets General") is a Delaware corporation with principal offices in Woodbridge, New Jersey. Supermarkets General operates over 100 supermarket-drugstore retail outlets under the name "Pathmark," which are concentrated in the mid-Atlantic region of the United States. Supermarkets General purchases beef at wholesale and sells beef at retail.

15. The defendant NATIONAL TEA COMPANY (hereinafter "National Tea") is an Illinois corporation with principal offices in Rosemont, Illinois. National Tea and its subsidiaries operate more than 450 retail food stores in the United States, concentrated primarily in the midwest and south central United States. National Tea buys beef at wholesale and sells beef at retail.

16. The defendant STOP & SHOP COMPANIES, INC. (hereinafter "Stop & Shop") is a Massachusetts corporation with principal offices in Boston, Massachusetts. Stop & Shop and its subsidiaries operate over 300 retail food stores concentrated in the New England area of the United States. Stop & Shop buys beef at wholesale and sells beef at retail.

17. The defendant FIRST NATIONAL STORES, INC. (hereinafter "First National") is a Massachusetts corporation with principal offices in Somerville, Massachusetts. First National and its subsidiaries operate over 260 retail food stores, concentrated primarily in the New England area of the United States and in New York and New Jersey under the name Finast. First National buys beef at wholesale and sells beef at retail.

18. The defendant COLONIAL STORES, INC. (hereinafter "Colonial") is a Virginia corporation with principal offices in Atlanta, Georgia. Colonial and its subsidiaries operate over 375 retail food stores concentrated in the southeastern part of the United States. Colonial buys beef at wholesale and sells beef at retail.

19. The defendant ALLIED SUPERMARKETS, INC. (hereinafter "Allied") is a Delaware corporation with principal offices in Livonia, Michigan. Allied and its subsidiaries operate approximately 250 retail food stores concentrated in

the midwestern United States and particularly in Michigan and Ohio. Allied buys beef at wholesale and sells beef at retail.

20. The defendant GIANT FOOD, INC. (hereinafter "Giant") is a Delaware corporation with principal offices in Landover, Maryland. Giant and its subsidiaries operate over 100 retail food stores concentrated in the Washington, D.C. area. Giant buys beef at wholesale and sells beef at retail.

21. The defendant BORMAN'S, INC. (hereinafter "Borman's") is a Delaware corporation with principal offices in Detroit, Michigan. Borman's and its subsidiaries operate over 80 retail food stores concentrated in the Detroit, Michigan, area. Borman's buys beef at wholesale and sells beef at retail.

22. The defendant PUEBLO INTERNATIONAL, INC. (hereinafter "Pueblo") is a Delaware corporation with principal offices in New York, New York. Pueblo and its subsidiaries operate approximately 100 retail food stores concentrated under the name Pueblo in Puerto Rico and under the name Hills in New York City. Pueblo buys beef at wholesale and sells beef at retail.

23. The defendant NATIONAL ASSOCIATION OF FOOD CHAINS, now as a result of merger known as FOOD MARKETING INSTITUTE (hereinafter "NAFC"), has principal offices located in Washington, D. C., and Chicago, Illinois. NAFC is a trade organization whose members are the largest retail food chains in the United States; small food companies and independents were formerly not eligible for membership. The retail food chains that comprise the membership of the NAFC are the largest purchasers of carcass beef in the United States. The NAFC recently has merged with the Supermarket Institute and is now known as Food Marketing Institute.

24. The defendant NATIONAL PROVISIONER, INCORPORATED (hereinafter "National Provisioner") is a New York corporation with principal offices in Chicago, Illinois. The National Provisioner publishes market advisory services, including The National Provisioner Daily Market and News Service or "Yellow Sheet" which lists the prices for beef during various time periods.

III.

CO-CONSPIRATORS

25. Various other companies, firms, associations, and individuals not now made defendants in this Complaint, participated as co-conspirators in the offenses charged herein, and in other concurrent conspiracies in violation of the antitrust laws, which jointly and/or severally and/or concurrently have injured the plaintiffs in their businesses and properties, and performed acts and made statements in furtherance thereof.

IV.

NATURE OF TRADE AND COMMERCE

26. Cattle are raised and fed on farms, ranches and feedlots such as those operated by the plaintiffs and members of MPIA. Some cattlemen purchase calves from others for fattening, while other cattlemen fatten cattle they have raised from birth. Cattle are fattened by feeding them a concentrated feed ration for fast growth and fattening until they are ready for slaughter as fat cattle.

27. Cattlemen must make irrevocable decisions concerning the supply of cattle between six and 18 months prior to the time that the animal will be marketed. These decisions are known to packers and defendant chain stores and other co-conspirators through reports made by the United States Department of Agriculture and others. Inasmuch as the cattle-

man's decision to raise and feed cattle must be made from six to 18 months in advance of sale, he cannot pass on or recoup from his suppliers any damages or loss resulting from his sale of cattle. A fat steer or heifer is required to be sold within a three-week period of time when the animal reaches choice grade. The cattleman must accept whatever price is given at that time, because retention of the animal results in over-fattening and significant loss of value. Supply of cattle and beef in the short term is known throughout the industry and is inelastic.

28. The vast majority of fat cattle are purchased by beef slaughterers and packers directly from cattlemen, although some fat cattle are purchased by beef slaughterers through terminal or auction markets. The direct basis for the price given plaintiffs and members of MPIA by beef slaughterers for fat cattle is a price stated in a publication known as the "National Provisioner Daily Market and News Service" or "Yellow Sheet" for all transactions east of the Rocky Mountains and some transactions west of the Rocky Mountains, and for other transactions west of the Rocky Mountains, the "Safeway price." Cattle buyers for beef slaughterers figure the percentage of dressed meat on the live animal and give the cattle feeder a price for the live animal based upon the value of the dressed carcass according to a formula based on the Yellow Sheet or its west coast counterpart, the "Safeway price."

29. Beef slaughterers and packers slaughter live cattle and sell edible beef and beef by-products in interstate commerce. The live cattle are reduced by the slaughterers and packers to carcass beef, beef primals and beef sub-primals prior to sale. Some edible beef is sold by slaughterers and packers as hanging beef, while other beef is vacuum-packed and sold by packers as boxed beef.

30. A substantial majority of edible beef is sold to retail food chain stores such as the defendants herein. Large food chains buy most beef directly from packers and slaughterers. The wholesale market for choice beef in the United States is established on a weekly basis by the actions of the defendants and other co-conspirators, through their size and monopsony market power and as a result of understandings and agreements among themselves and other retail food chains.

31. A&P and Safeway, and other co-conspirators at other times and places, negotiate for and buy beef in the wholesale market early in the week, which establishes the wholesale price of beef for the remainder of the defendants and co-conspirator chain stores. The price is established by the major leading chains through the use of their monopsony market power, which is enlarged and enhanced by their understandings and agreements with other defendants and co-conspirators. This action is designed to depress the wholesale price of carcass and boxed beef, which directly controls the price of live cattle.

32. The weekly pricing decisions of A&P, Safeway and other defendants and co-conspirators are instantly communicated by the wholesale beef trade (including chain store buyers, brokers, breakers, packers, and others). The cattleman is not privy to any of this extensive communication among the wholesale beef trade. The weekly market pricing decisions of A&P and Safeway and other defendants and co-conspirators are then reflected in the Yellow Sheet and the west coast "Safeway price." Other co-defendant chain stores and co-conspirators utilize this Yellow Sheet price or "Safeway price" as the contractual basis for the price they will pay beef packers and slaughterers for wholesale beef.

33. Approximately 80 per cent of the choice slaughtered beef in the United States is purchased by formulae, the basis of which is the Yellow Sheet price and the west coast "Safeway price." This use by chain store defendants and co-conspirators of the Yellow Sheet and the "Safeway price" as a tool to communicate price and as a basis for wholesale beef prices, combined with the use of the Yellow Sheet and the "Safeway price" by all major beef slaughterers and packers as a direct basis of prices paid for live cattle, constitutes a direct pass-through of the price established by the defendant chain stores to the cattlemen.

34. At dates unknown to the plaintiffs, including some believed to be prior to 1963, the defendants and other co-conspirator chain stores combined and conspired to employ monopolistic-monopsonistic and other non-competitive methods in the purchase and marketing of beef to the detriment of cattlemen, and particularly the plaintiffs and the members of MPIA. Among the overt manifestations of these combinations, agreements and attempts to monopolize, are the following:

a. Many retail food chains, including the defendant food chains named herein and other co-conspirators, have engaged in centralized buying whereby beef purchases can be made for the entire chain or a substantial part thereof, from one or more central locations.

b. Specifications have been established by the defendant retail food chains and other co-conspirators for the beef they buy. In most instances, the specifications for beef carcasses or parts thereof have varied among the different defendant food chains and other co-conspirators in instances where the defendant food chains have had retail marketing outlets in the same marketing area, or in instances where the various different defendant food chains have been buying from the

same packer or slaughterer sources, thus eliminating competition between and among the defendants and other co-conspirators.

c. The defendant food chains and other co-conspirators have allocated retail marketing areas of the United States so that retail outlets of the defendants compete with one another in increasingly fewer instances. Over the years, defendants and other co-conspirators have increasingly engaged in the practice of concentrating more intensively in the various marketing areas in which they have been dominant for the purpose of eliminating competition, attempting to monopolize and establishing market dominance.

d. The defendant food chains and other co-conspirators have agreed not to compete with one another on a price basis in purchasing beef at wholesale. Instead they have agreed that A&P and Safeway, and other defendants and co-conspirators at other times and places, will establish the wholesale price and the remaining defendants and co-conspirators will utilize the Yellow Sheet or "Safeway price." This is for the designed purpose of eliminating price competition for wholesale beef, of increasing the wholesale-retail price spreads for beef and of driving down the price of live cattle.

e. The defendant food chains and other co-conspirators have agreed not to compete with one another on a price basis in the pricing of beef at retail. Instead, they have agreed to establish uniform margins or spreads between the wholesale and retail price of the various beef cuts. Further, the defendant food chains and other co-conspirators have agreed upon uniform advertising policies and the uniform raising and lowering of retail beef prices for the designed purpose of manipulating and influencing the consumer demand for beef. Through uniform entry into the wholesale beef market or uni-

form withdrawal from the wholesale beef market, the defendant food chains and other co-conspirators have combined to monopolize to affect the demand for beef products and artificially depress the wholesale price of beef products to an unreasonably low level, which level is directly reflected by the Yellow Sheet price and the "Safeway price," and which prices are directly passed on to the beef producer.

f. By combining to utilize their superior marketing power, the defendant food chains and other co-conspirators have developed extensive warehousing facilities and have utilized vacuum-packaging as a device to store beef for an extended period of time, permitting said chains and other co-conspirators to uniformly withdraw from the wholesale beef market for the purpose of artificially lessening the demand for newly slaughtered beef and cattle, thus directly and artificially lowering the price for cattle. Through combination and the use of monopoly power and knowledge, this warehousing and use of vacuum-packaging has been used by the defendant chain stores and other co-conspirators as a lever to depress the price of beef, to break price rallies, and to depress the beef prices to an artificially low level.

34. Most slaughterers and packers have standing agreements with various receivers, including the defendant chain stores and other co-conspirators, for certain quantities of beef each week. With knowledge of their weekly requirements and of the prices quoted in the Yellow Sheet or the "Safeway price," the packers and slaughterers directly pass down the price established by the defendant retail food chains. The packers and slaughterers in aggregate do not suffer any diminution of sales, purchases, margins or profits as a result of this artificially low price.

35. During the period of time covered by this Complaint, defendants have been and are now engaged in interstate trade and commerce in the purchase, distribution and sale of fresh, frozen and processed beef products. Cattle move by truck and railroad in interstate commerce from calf-producing states into Iowa, including the Southern District of Iowa, and other states. Most livestock slaughtering plants are located near the areas of livestock production and feeding, a major area of which is Iowa, including the Southern District of Iowa. Beef carcasses and parts thereof from the slaughterhouses and meat packers move by truck and railroad in interstate commerce from and through Iowa, including the Southern District of Iowa, and other states to surrounding states and into all areas of the United States. The defendant retail food chains and others distribute the processed beef in interstate commerce to their various store locations throughout the United States. There is a continuous movement of cattle and fresh, frozen and processed beef across state lines in the channels of interstate commerce. Violations of the antitrust laws hereinafter alleged have necessarily directly and substantially affected the aforesaid interstate trade and commerce in cattle and fresh, frozen, and processed beef.

V.

OFFENSES CHARGED

36. Beginning at a date unknown to the plaintiffs, but at least as early as 1963, and continuing up to the date of this Amended and Substituted Complaint, the defendants and coconspirators, through meetings arranged and conducted by defendant, National Association of Food Chains (now as a result of merger known as Food Marketing Institute), and by other means, have engaged and are now engaged in an unlawful combination and conspiracy and unreasonable restraint of

the aforesaid trade and commerce in cattle and fresh and processed beef and have engaged and are now engaged in an unlawful combination and conspiracy to monopolize and have monopolized and attempted to monopolize, and are now monopolizing and attempting to monopolize, both unilaterally and jointly, such trade and commerce in violation of §§ 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2).

37. The aforesaid combination and conspiracy to restrain trade and commerce and the combination and conspiracy to monopolize and the monopolization and the attempt to monopolize such trade and commerce have consisted of a continuing course of conduct, plan, agreement and concert of action by and among the defendants and their co-conspirators, the substantial terms, purposes and intent of which have been to:

a. Fix, stabilize and maintain at uniform non-competitive and artificially low levels, the price paid to slaughterhouses and beef packers for fresh and processed beef, which artificially low prices are directly passed through to cattlemen and are not absorbed in whole or in part by packers and slaughterers, because of the utilization of the device of formula pricing to cattlemen based upon the Yellow Sheet, and on the west coast, the "Safeway price."

b. Utilize market dominance and economic power to constantly increase in a non-cost justified manner, the wholesale-retail price margin or spread for beef, by charging non-competitive and artificially high prices for fresh and processed beef sold at retail to consumers, thus artificially depressing the true demand for beef and manipulating, controlling and depressing the price of cattle.

c. Allocate geographic territories among themselves to eliminate competition among themselves and other co-conspirators in the purchase and sale of beef and to increase market

concentration and dominance in given areas, to increase the wholesale-retail price spread of beef, and thus cause the price of wholesale slaughtered beef and cattle to drop to artificially low levels.

d. Specify different quality, yield and trim standards for wholesale slaughtered beef in instances where the defendants have retail stores in the same geographic area, or where the defendants buy wholesale beef from the same packer and slaughterer sources, for the purpose of eliminating competition among themselves and artificially depressing demand and price for cattle.

e. Eliminate competition for fresh and processed beef by employing a system whereby A&P and Safeway, and other co-conspirators at other times and places, set prices on an agreed-upon and understood time of the week, which prices are followed by all other defendant retail food chains and other co-conspirators by means of formula prices based on the "Yellow Sheet" and the "Safeway price" on the west coast.

f. Eliminate price competition for fresh and processed beef by means of manipulation of the "Yellow Sheet" published by the defendant, National Provisioner, for the purpose of communicating beef prices and calculating beef prices, with knowledge that the "Yellow Sheet" price is utilized by all major beef packers and slaughterers as a device to directly pass on to cattlemen the artificially low price set by the defendant food chains and other co-conspirators.

g. Utilize the National Association of Food Chains and others to develop and effectuate the aforesaid price-fixing conspiracy and attempt to monopolize.

VI.

FRAUDULENT CONCEALMENT

38. The defendants and co-conspirators repeatedly fraudulently concealed the existence of their combination and conspiracy and attempt to monopolize by various means used to avoid the detection thereof, including express denials on the public record under oath, of meeting together to discuss meat pricing, and as a result of such concealment the plaintiffs and members of MPIA and each of them had no knowledge and could not by the exercise of reasonable diligence have obtained the knowledge of the existence of the combination and conspiracy and attempt to monopolize until July 17, 1974, when it was disclosed in a trial at the United States District Court for the Northern District of California that the defendant co-conspirators did indeed meet together to discuss the pricing of beef.

39. By virtue of this fraudulent concealment, plaintiffs and members of MPIA and each of them, assert the tolling of the applicable statute or period of limitations affecting plaintiffs' rights to action herein.

VII.

INJURY TO PLAINTIFFS

40. As a direct and proximate result of the unlawful acts and conduct of defendants and co-conspirators hereinbefore alleged, plaintiffs and members of MPIA have suffered injury to their business and property as follows:

a. Loss of and reduction in value of their respective businesses;

b. Loss and decrease in revenues and profits which would have otherwise been earned;

c. Incurrence of additional expenses which would otherwise have been avoided by the increased economies lost due to

the inhibition and limitation on expansion caused by depressed prices.

d. Loss of revenues measured by the difference between the artificially depressed price received by plaintiffs and the members of MPIA and the price they would have received had free market conditions existed.

41. The precise extent of the aforesaid damages are not presently known, and plaintiffs hereby pray leave of Court to amend this Complaint when said amount has been ascertained.

WHEREFORE, Plaintiffs pray that this Court adjudge and decree that:

1. Defendants and their co-conspirators have combined and conspired in restraint of trade and commerce as hereinabove described, and have combined and conspired to monopolize, have monopolized and attempted to monopolize the aforesaid trade and commerce in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2);

2. Plaintiffs and members of MPIA and each of them, have been injured as a direct and proximate result of the aforesaid violations of the antitrust laws of the United States;

3. Plaintiffs, on behalf of members of MPIA and each of them, recover their actual damages which must be trebled in accordance with the provisions of Section 4 of the Clayton Act (15 U.S.C. § 15) from the defendants who are jointly and severally liable therefor;

4. Plaintiffs and the members of MPIA, and each of them, recover the costs of suit together with attorneys' fees as provided by § 4 of the Clayton Act (15 U.S.C. § 15);

5. Defendants, and each of them, be permanently enjoined and restrained from each and every unlawful practice alleged herein as provided by Section 16 of the Clayton Act (15 U.S.C. § 26);

6. Plaintiffs and the members of MPIA be awarded such other and further relief as this Court may deem just and proper.

Dated this 16th day of August, 1977.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:
BEEF INDUSTRY ANTITRUST LITIGATION

THIS MATTER PERTAINS TO:
MEAT PRICE INVESTIGATORS ASSOCIATION, ET AL.,
Plaintiffs,

vs.

SAFEWAY STORES, INC., ET AL.,
Defendants.

MDL DOCKET NO. 248
DOCKET NO. CA 3-76-1238-C

JURY DEMAND

COME NOW the plaintiffs in the above-entitled cause and hereby demand a trial by jury of the issues stated in the Complaint.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RONALD BECKER, EUGENE VANDER HAMM, FRANCIS STECHER, DEAN STECHER, and JAMES R. GLANN, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

vs.

SAFEWAY STORES, INCORPORATED, a Maryland Corporation; THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., a Maryland Corporation; THE KROGER CO., an Ohio Corporation; AMERICAN STORES COMPANY f/k/a ACME MARKETS, INC., a Delaware Corporation; LUCKY STORES, INC., a California Corporation; JEWEL COMPANIES, INC., a New York Corporation; WINN-DIXIE STORES, INC., a Florida Corporation; FOOD FAIR, INC., f/k/a FOOD FAIR STORES, INC., a Pennsylvania Corporation; GRAND UNION CO., a Delaware Corporation; SUPERMARKETS GENERAL CORP., a Delaware Corporation; NATIONAL TEA COMPANY, an Illinois Corporation; STOP & SHOP COMPANIES, INC., a Massachusetts Corporation; FIRST NATIONAL STORES, INC., a Massachusetts Corporation; COLONIAL STORES, INC., a Virginia Corporation; ALLIED SUPERMARKETS, INC., a Delaware Corporation; GIANT FOOD, INC., a Delaware Corporation; BORMAN'S INC., a Delaware Corporation; PUEBLO INTERNATIONAL INC., a Delaware Corporation; NATIONAL ASSOCIATION OF FOOD CHAINS, now, as a result of merger, known as FOOD MARKETING INSTITUTE; and NATIONAL PROVISIONER, INCORPORATED, a New York Corporation,

Defendants.

CIVIL NO. 76-251-1
In re: Beef Industry Antitrust Litigation
M.D.L. No. 248
No. CA 3-76-1361-C
(N.D.Tex.)

AMENDED AND SUBSTITUTED COMPLAINT
(Class Action)
JURY TRIAL DEMAND

Plaintiffs, by and through their attorneys, bring this civil action against the above-named defendants and each of them, on behalf of themselves and all other persons, firms, corporations or other entities similarly situated for treble the amount of damages suffered by them by reason of the defendants' violation of the antitrust laws of the United States and for injunctive relief, and demanding a trial by jury, complain against defendants, and each of them, and allege as follows:

I.

JURISDICTION AND VENUE

1. This Complaint is filed and these proceedings are instituted against the named defendants for violations of §§ 1 and 2 of the Act of Congress of July 2, 1890 (26 Stat. 209), as amended (15 U.S.C. §§ 1 and 2) commonly known as the Sherman Act. This action is brought by the plaintiffs and each of them, and for members of the class they represent for threefold the damages suffered by them including reasonable attorneys fees, and for injunctive relief under §§ 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26). This Court has jurisdiction of the subject matter pursuant to 28 U.S.C. § 1337.

2. Each of the defendants or its agents or co-conspirators maintains offices, transacts business, or is found within the Southern District of Iowa, and is within the jurisdiction of this Court for the purpose of service of process. Many of the unlawful acts done in violation of the antitrust laws, as hereinafter alleged, have been performed within the Southern District of Iowa. The interstate trade and commerce described hereinafter is carried on, in part, within the Southern District of Iowa.

II.

CLASS ACTION

3. This Complaint is properly maintainable as a class action under the provisions of Federal Rules of Civil Procedure 23(a) and 23(b)(3) as follows:

a. The class consists of all persons who are engaged in the business of raising what is commonly known in the cattle business as fat cattle and each person who has in the period in question sold more than 100 head of fat cattle per annum, with the exception that the plaintiffs named in the following enumerated lawsuits presently on file in the various district courts of the United States are not a part of this class:

(1) *Peterson, et al. v. Safeway Stores, Inc., et al.*, Civil No. C-75-0984-RFP (N.D.Cal., filed May 16, 1975);

(2) *Pony Creek Cattle Company, Inc., et al. v. The Great Atlantic & Pacific Tea Company, et al.*, Civil No. CA 3-75-0702-C (N.D.Tex. [Dallas Division] filed June 3, 1975);

(3) *Lowe, et al. v. Safeway Stores, Inc., et al.*, Civil No. C-75-4043 (N.D.Iowa, filed July 29, 1975);

(4) *Meat Price Investigators Association, et al. v. Safeway Stores, Inc., et al.*, Civil No. C-75-333-2 (S.D.Iowa, filed December 1, 1975);

(5) *Agee, et al. v. Safeway Stores, Inc., et al.*, Civil No. R-75-224-BRT (D.Nev., filed December 5, 1975);

(6) *Black, et al. v. Acme Markets, Inc., et al.*, Civil No. CA 2-75-186 (N.D. Tex. [Amarillo Division] filed December 30, 1975);

(7) *Chaparral Cattle Corp., et al. v. Safeway Stores, Inc., et al.*, Civil No. C-76-79 (D.Utah [Central Division], filed March 15, 1976);

(8) *James F. Boccardo and Boccardo Cattle Company v. Safeway Stores, Inc., et al.*, Civil No. C-76-600-OJC (N.D.Cal., filed March 24, 1976).

b. Plaintiffs are members of said class; their claims are typical of the claims of the members of said class.

c. Plaintiffs believe that the members of said class are so numerous as to make joinder impracticable, the exact number and identification of the class being unknown to plaintiffs, but on information plaintiffs believe that the class would consist of approximately 36,000 fat cattle producers or feeders.

d. The claims of the class involve common questions of both fact and law. Some common questions of fact include whether the defendants participated in a combination and conspiracy to fix, artificially maintain, stabilize or lower the selling price of choice beef or its equivalent purchased by them during the period in question, thus directly lowering the selling price for fat cattle; whether the defendants utilized market dominance and economic power to constantly increase in a non-cost justified manner, the wholesale-retail price margin or spread for beef; whether the defendants agreed to al-

locate geographic territories among themselves and to increase their market concentration and dominance in given areas; whether the defendants have agreed to specify different quality, yield and trim standards for wholesale slaughtered beef; whether the defendants have combined and conspired and attempted to monopolize for the purpose of eliminating competition for fresh, frozen and processed beef by employing a system of agreed-upon price leadership, which prices are followed by other defendants and co-conspirators by means of formula prices based on the "Yellow Sheet" and the "Safeway price" on the west coast; whether the defendants have combined and conspired and attempted to monopolize for the purpose of eliminating price competition for slaughtered beef by means of manipulation of the "Yellow Sheet;" and whether the defendants have monopolized, attempted to monopolize and combined to monopolize important areas of beef purchasing, and cattle purchasing, which has directly affected and controlled the price of live cattle. Some common questions of law include whether the actions alleged constitute violations of §§ 1 and 2 of the Sherman Act and thereby create liability of the defendants to the class.

e. The questions of law and fact common to the members of the class predominate over any questions affecting only individual members.

f. A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

g. Plaintiffs will adequately represent the interests of the class.

III.
PARTIES

PLAINTIFFS

4. Plaintiffs, Ronald Becker, Ireton, Iowa; Eugene Vander Hamm, Ireton, Iowa; Francis Stecher, Stockton, Iowa; Dean Stecher, Stockton, Iowa; and James R. Glann, Oklahoma City, Oklahoma, are and have been at all times material hereto raisers and feeders of fat cattle for ultimate slaughter.

DEFENDANTS

5. The defendant SAFEWAY STORES, INCORPORATED (hereinafter "Safeway") is a Maryland corporation with its principal office in Oakland, California. Safeway and its subsidiaries operate the largest chain of retail food stores in the United States, with more than 2400 stores, concentrated primarily west of the Mississippi River and also in the Washington, D. C. area. Safeway buys beef at wholesale and sells beef at retail.

6. The defendant THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC. (hereinafter "A&P") is a Maryland corporation with its principal office in Montvale, New Jersey. A&P and its subsidiaries operate the second largest chain of retail food stores in the United States, with more than 2,000 stores, concentrated east of the Mississippi River. A&P buys beef at wholesale and sells beef at retail.

7. The defendant THE KROGER CO. (hereinafter "Kroger") is an Ohio corporation with its principal office in Cincinnati, Ohio. Kroger and its subsidiaries operate the third largest chain of retail food stores in the United States, with more than 1,200 stores, concentrated in the mid-Atlantic, mid-Western and sourthern regions of the United States. Kroger buys beef at wholesale and sells beef at retail.

8. The defendant AMERICAN STORES COMPANY, formerly Acme Markets, Inc. (hereinafter "American Stores") is a Delaware corporation with principal offices in Wilmington, Delaware. American Stores and its subsidiaries

operate 787 retail food stores in the United States, with Acme Markets stores concentrated in the mid-Atlantic states and Alpha Beta stores concentrated in Arizona and California. These stores buy beef at wholesale and sell beef at retail. American Stores runs beef slaughtering and packing facilities which purchase cattle and supply virtually all requirements of American Stores' retail outlets as well as sell beef at wholesale to other defendant chain stores and co-conspirators.

9. The defendant LUCKY STORES, INC. (hereinafter "Lucky") is a California corporation with its principal offices in Dublin, California. Lucky and its subsidiaries operate approximately 400 retail food stores in the United States, with Lucky and Food Basket stores concentrated in California and the Western states and Eagle stores concentrated in the mid-West and Texas. Lucky purchases beef at wholesale and sells beef at retail.

10. The defendant JEWEL COMPANIES, INC. (hereinafter "Jewel") is a New York corporation with principal offices in Chicago, Illinois. Jewel and its subsidiaries operate approximately 400 retail food stores in the United States, with approximately 300 Jewel and Eisner stores concentrated in the Chicago area, approximately 60 Star stores concentrated in New England and 40 Buttrey stores concentrated in the Northwest. Jewel purchases beef at wholesale and sells beef at retail.

11. The defendant WINN-DIXIE STORES, INC. (hereinafter "Winn-Dixie") is a Florida corporation with its principal offices in Jacksonville, Florida. Winn-Dixie and its subsidiaries operate approximately 1,000 retail food stores under the names Winn-Dixie and Kwik-Chek, which are concentrated in the Southeastern United States. Winn-Dixie purchases beef

at wholesale and sells beef at retail. Winn-Dixie also runs beef slaughtering and packing plants which purchase live cattle and supply and sell beef at wholesale.

12. The defendant FOOD FAIR, INC., formerly Food Fair Stores, Inc. (hereinafter "Food Fair"), is a Pennsylvania corporation with principal offices in Philadelphia, Pennsylvania. Food Fair and its subsidiaries operate approximately 450 retail food stores concentrated in the eastern seaboard area of the United States and particularly concentrated in Florida and Pennsylvania. Food Fair buys beef at wholesale and sells beef at retail. Food Fair also operates beef slaughtering and packing plants which purchase cattle and supply virtually all of requirements of Food Fair's retail outlets as well as sell beef at wholesale to other defendant chain stores and co-conspirators.

13. The defendant GRAND UNION CO. (hereinafter "Grand Union") is a Delaware corporation with principal offices in Elmwood Park, New Jersey. Grand Union and its subsidiaries operate approximately 500 retail food stores concentrated along the eastern seaboard area of the United States and concentrated particularly in New York and New Jersey. Grand Union purchases beef at wholesale and sells beef at retail.

14. The defendant SUPERMARKETS GENERAL CORP. (hereinafter "Supermarkets General") is a Delaware corporation with principal offices in Woodbridge, New Jersey. Supermarkets General operates over 100 supermarket-drugstore retail outlets under the name "Pathmark," which are concentrated in the mid-Atlantic region of the United States. Supermarkets General purchases beef at wholesale and sells beef at retail.

15. The defendant NATIONAL TEA COMPANY (hereinafter "National Tea") is an Illinois corporation with principal offices in Rosemont, Illinois. National Tea and its subsidiaries operate more than 450 retail food stores in the United States, concentrated primarily in the midwest and south central United States. National Tea buys beef at wholesale and sells beef at retail.

16. The defendant STOP & SHOP COMPANIES, INC. (hereinafter "Stop & Shop") is a Massachusetts corporation with principal offices in Boston, Massachusetts. Stop & Shop and its subsidiaries operate over 300 retail food stores concentrated in the New England area of the United States. Stop & Shop buys beef at wholesale and sells beef at retail.

17. The defendant FIRST NATIONAL STORES, INC. (hereinafter "First National") is a Massachusetts corporation with principal offices in Somerville, Massachusetts. First National and its subsidiaries operate over 260 retail food stores, concentrated primarily in the New England area of the United States and in New York and New Jersey under the name Finast. First National buys beef at wholesale and sells beef at retail.

18. The defendant COLONIAL STORES, INC. (hereinafter "Colonial") is a Virginia corporation with principal offices in Atlanta, Georgia. Colonial and its subsidiaries operate over 375 retail food stores concentrated in the southeastern part of the United States. Colonial buys beef at wholesale and sells beef at retail.

19. The defendant ALLIED SUPERMARKETS, INC. (hereinafter "Allied") is a Delaware corporation with principal offices in Livonia, Michigan. Allied and its subsidiaries operate approximately 250 retail food stores concentrated in

the midwestern United States and particularly in Michigan and Ohio. Allied buys beef at wholesale and sells beef at retail.

20. The defendant GIANT FOOD, INC. (hereinafter "Giant") is a Delaware corporation with principal offices in Landover, Maryland. Giant and its subsidiaries operate over 100 retail food stores concentrated in the Washington, D.C. area. Giant buys beef at wholesale and sells beef at retail.

21. The defendant BORMAN'S, INC. (hereinafter "Borman's") is a Delaware corporation with principal offices in Detroit, Michigan. Borman's and its subsidiaries operate over 80 retail food stores concentrated in the Detroit, Michigan, area. Borman's buys beef at wholesale and sells beef at retail.

22. The defendant PUEBLO INTERNATIONAL, INC. (hereinafter "Pueblo") is a Delaware corporation with principal offices in New York, New York. Pueblo and its subsidiaries operate approximately 100 retail food stores concentrated under the name Pueblo in Puerto Rico and under the name Hills in New York City. Pueblo buys beef at wholesale and sells beef at retail.

23. The defendant NATIONAL ASSOCIATION OF FOOD CHAINS, now as a result of merger known as FOOD MARKETING INSTITUTE (hereinafter "NAFC"), has principal offices located in Washington, D. C., and Chicago, Illinois. NAFC is a trade organization whose members are the largest retail food chains in the United States; small food companies and independents were formerly not eligible for membership. The retail food chains that comprise the membership of the NAFC are the largest purchasers of carcass beef in the United States. The NAFC recently has merged with the Supermarket Institute and is now known as Food Marketing Institute.

24. The defendant NATIONAL PROVISIONER, INCORPORATED (hereinafter "National Provisioner") is a New York corporation with principal offices in Chicago, Illinois. The National Provisioner publishes market advisory services, including The National Provisioner Daily Market and News Service or "Yellow Sheet" which lists the prices for beef during various time periods.

IV.

CO-CONSPIRATORS

25. Various other companies, firms, associations, and individuals not now made defendants in this Complaint, participated as co-conspirators in the offenses charged herein, and in other concurrent conspiracies in violation of the antitrust laws, which jointly and/or severally and/or concurrently have injured the plaintiffs in their businesses and properties, and performed acts and made statements in furtherance thereof.

V.

NATURE OF TRADE AND COMMERCE

26. Cattle are raised and fed on farms, ranches and feedlots such as those operated by the plaintiffs and members of MPIA. Some cattlemen purchase calves from others for fattening, while other cattlemen fatten cattle they have raised from birth. Cattle are fattened by feeding them a concentrated feed ration for fast growth and fattening until they are ready for slaughter as fat cattle.

27. Cattlemen must make irrevocable decisions concerning the supply of cattle between six and 18 months prior to the time that the animal will be marketed. These decisions are known to packers and defendant chain stores and other co-conspirators through reports made by the United States Department of Agriculture and others. Inasmuch as the cattle-

man's decision to raise and feed cattle must be made from six to 18 months in advance of sale, he cannot pass on or recoup from his suppliers any damages or loss resulting from his sale of cattle. A fat steer or heifer is required to be sold within a three-week period of time when the animal reaches choice grade. The cattleman must accept whatever price is given at that time, because retention of the animal results in over-fattening and significant loss of value. Supply of cattle and beef in the short term is known throughout the industry and is inelastic.

28. The vast majority of fat cattle are purchased by beef slaughterers and packers directly from cattlemen, although some fat cattle are purchased by beef slaughterers through terminal or auction markets. The direct basis for the price given plaintiffs and members of MPIA by beef slaughterers for fat cattle is a price stated in a publication known as the "National Provisioner Daily Market and News Service" or "Yellow Sheet" for all transactions east of the Rocky Mountains and some transactions west of the Rocky Mountains, and for other transactions west of the Rocky Mountains, the "Safeway price." Cattle buyers for beef slaughterers figure the percentage of dressed meat on the live animal and give the cattle feeder a price for the live animal based upon the value of the dressed carcass according to a formula based on the Yellow Sheet or its west coast counterpart, the "Safeway price."

29. Beef slaughterers and packers slaughter live cattle and sell edible beef and beef by-products in interstate commerce. The live cattle are reduced by the slaughterers and packers to carcass beef, beef primals and beef sub-primals prior to sale. Some edible beef is sold by slaughterers and packers as hanging beef, while other beef is vacuum-packed and sold by packers as boxed beef.

30. A substantial majority of edible beef is sold to retail food chain stores such as the defendants herein. Large food chains buy most beef directly from packers and slaughterers. The wholesale market for choice beef in the United States is established on a weekly basis by the actions of the defendants and other co-conspirators, through their size and monopsony market power and as a result of understandings and agreements among themselves and other retail food chains.

31. A&P and Safeway, and other co-conspirators at other times and places, negotiate for and buy beef in the wholesale market early in the week, which establishes the wholesale price of beef for the remainder of the defendants and co-conspirator chain stores. The price is established by the major leading chains through the use of their monopsony market power, which is enlarged and enhanced by their understandings and agreements with other defendants and co-conspirators. This action is designed to depress the wholesale price of carcass and boxed beef, which directly controls the price of live cattle.

32. The weekly pricing decisions of A&P, Safeway and other defendants and co-conspirators are instantly communicated by the wholesale beef trade (including chain store buyers, brokers, breakers, packers, and others). The cattleman is not privy to any of this extensive communication among the wholesale beef trade. The weekly market pricing decisions of A&P and Safeway and other defendants and co-conspirators are then reflected in the Yellow Sheet and the west coast "Safeway price." Other co-defendant chain stores and co-conspirators utilize this Yellow Sheet price or "Safeway price" as the contractual basis for the price they will pay beef packers and slaughterers for wholesale beef.

33. Approximately 80 per cent of the choice slaughtered beef in the United States is purchased by formulae, the basis of which is the Yellow Sheet price and the west coast "Safeway price." This use by chain store defendants and co-conspirators of the Yellow Sheet and the "Safeway price" as a tool to communicate price and as a basis for wholesale beef prices, combined with the use of the Yellow Sheet and the "Safeway price" by all major beef slaughterers and packers as a direct basis of prices paid for live cattle, constitutes a direct pass-through of the price established by the defendant chain stores to the cattlemen.

34. At dates unknown to the plaintiffs, including some believed to be prior to 1963, the defendants and other co-conspirator chain stores combined and conspired to employ monopolistic-monopsonistic and other non-competitive methods in the purchase and marketing of beef to the detriment of cattlemen, and particularly the plaintiffs and the members of MPIA. Among the overt manifestations of these combinations, agreements and attempts to monopolize, are the following:

a. Many retail food chains, including the defendant food chains named herein and other co-conspirators, have engaged in centralized buying whereby beef purchases can be made for the entire chain or a substantial part thereof, from one or more central locations.

b. Specifications have been established by the defendant retail food chains and other co-conspirators for the beef they buy. In most instances, the specifications for beef carcasses or parts thereof have varied among the different defendant food chains and other co-conspirators in instances where the defendant food chains have had retail marketing outlets in the same marketing area, or in instances where the various different defendant food chains have been buying from the

same packer or slaughterer sources, thus eliminating competition between and among the defendants and other co-conspirators.

c. The defendant food chains and other co-conspirators have allocated retail marketing areas of the United States so that retail outlets of the defendants compete with one another in increasingly fewer instances. Over the years, defendants and other co-conspirators have increasingly engaged in the practice of concentrating more intensively in the various marketing areas in which they have been dominant for the purpose of eliminating competition, attempting to monopolize and establishing market dominance.

d. The defendant food chains and other co-conspirators have agreed not to compete with one another on a price basis in purchasing beef at wholesale. Instead they have agreed that A&P and Safeway, and other defendants and co-conspirators at other times and places, will establish the wholesale price and the remaining defendants and co-conspirators will utilize the Yellow Sheet or "Safeway price." This is for the designed purpose of eliminating price competition for wholesale beef, of increasing the wholesale-retail price spreads for beef and of driving down the price of live cattle.

e. The defendant food chains and other co-conspirators have agreed not to compete with one another on a price basis in the pricing of beef at retail. Instead, they have agreed to establish uniform margins or spreads between the wholesale and retail price of the various beef cuts. Further, the defendant food chains and other co-conspirators have agreed upon uniform advertising policies and the uniform raising and lowering of retail beef prices for the designed purpose of manipulating and influencing the consumer demand for beef. Through uniform entry into the wholesale beef market or uni-

form withdrawal from the wholesale beef market, the defendant food chains and other co-conspirators have combined to monopolize to affect the demand for beef products and artificially depress the wholesale price of beef products to an unreasonably low level, which level is directly reflected by the Yellow Sheet price and the "Safeway price," and which prices are directly passed on to the beef producer.

f. By combining to utilize their superior marketing power, the defendant food chains and other co-conspirators have developed extensive warehousing facilities and have utilized vacuum-packaging as a device to store beef for an extended period of time, permitting said chains and other co-conspirators to uniformly withdraw from the wholesale beef market for the purpose of artificially lessening the demand for newly slaughtered beef and cattle, thus directly and artificially lowering the price for cattle. Through combination and the use of monopoly power and knowledge, this warehousing and use of vacuum-packaging has been used by the defendant chain stores and other co-conspirators as a lever to depress the price of beef, to break price rallies, and to depress the beef prices to an artificially low level.

34. Most slaughterers and packers have standing agreements with various receivers, including the defendant chain stores and other co-conspirators, for certain quantities of beef each week. With knowledge of their weekly requirements and of the prices quoted in the Yellow Sheet or the "Safeway price," the packers and slaughterers directly pass down the price established by the defendant retail food chains. The packers and slaughterers in aggregate do not suffer any diminution of sales, purchases, margins or profits as a result of this artificially low price.

35. During the period of time covered by this Complaint, defendants have been and are now engaged in interstate trade and commerce in the purchase, distribution and sale of fresh, frozen and processed beef products. Cattle move by truck and railroad in interstate commerce from calf-producing states into Iowa, including the Southern District of Iowa, and other states. Most livestock slaughtering plants are located near the areas of livestock production and feeding, a major area of which is Iowa, including the Southern District of Iowa. Beef carcasses and parts thereof from the slaughterhouses and meat packers move by truck and railroad in interstate commerce from and through Iowa, including the Southern District of Iowa, and other states to surrounding states and into all areas of the United States. The defendant retail food chains and others distribute the processed beef in interstate commerce to their various store locations throughout the United States. There is a continuous movement of cattle and fresh, frozen and processed beef across state lines in the channels of interstate commerce. Violations of the antitrust laws hereinafter alleged have necessarily directly and substantially affected the aforesaid interstate trade and commerce in cattle and fresh, frozen, and processed beef.

VI.

OFFENSES CHARGED

36. Beginning at a date unknown to the plaintiffs, but at least as early as 1963, and continuing up to the date of this Amended and Substituted Complaint, the defendants and coconspirators, through meetings arranged and conducted by defendant, National Association of Food Chains (now as a result of merger known as Food Marketing Institute), and by other means, have engaged and are now engaged in an unlawful combination and conspiracy and unreasonable restraint of

the aforesaid trade and commerce in cattle and fresh and processed beef and have engaged and are now engaged in an unlawful combination and conspiracy to monopolize and have monopolized and attempted to monopolize, and are now monopolizing and attempting to monopolize, both unilaterally and jointly, such trade and commerce in violation of §§ 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2).

37. The aforesaid combination and conspiracy to restrain trade and commerce and the combination and conspiracy to monopolize and the monopolization and the attempt to monopolize such trade and commerce have consisted of a continuing course of conduct, plan, agreement and concert of action by and among the defendants and their co-conspirators, the substantial terms, purposes and intent of which have been to:

a. Fix, stabilize and maintain at uniform non-competitive and artificially low levels, the price paid to slaughterhouses and beef packers for fresh and processed beef, which artificially low prices are directly passed through to cattlemen and are not absorbed in whole or in part by packers and slaughterers, because of the utilization of the device of formula pricing to cattlemen based upon the Yellow Sheet, and on the west coast, the "Safeway price."

b. Utilize market dominance and economic power to constantly increase in a non-cost justified manner, the wholesale-retail price margin or spread for beef, by charging non-competitive and artificially high prices for fresh and processed beef sold at retail to consumers, thus artificially depressing the true demand for beef and manipulating, controlling and depressing the price of cattle.

c. Allocate geographic territories among themselves to eliminate competition among themselves and other co-conspirators in the purchase and sale of beef and to increase market

concentration and dominance in given areas, to increase the wholesale-retail price spread of beef, and thus cause the price of wholesale slaughtered beef and cattle to drop to artificially low levels.

d. Specify different quality, yield and trim standards for wholesale slaughtered beef in instances where the defendants have retail stores in the same geographic area, or where the defendants buy wholesale beef from the same packer and slaughterer sources, for the purpose of eliminating competition among themselves and artificially depressing demand and price for cattle.

e. Eliminate competition for fresh and processed beef by employing a system whereby A&P and Safeway, and other co-conspirators at other times and places, set prices on an agreed-upon and understood time of the week, which prices are followed by all other defendant retail food chains and other co-conspirators by means of formula prices based on the "Yellow Sheet" and the "Safeway price" on the west coast.

f. Eliminate price competition for fresh and processed beef by means of manipulation of the "Yellow Sheet" published by the defendant, National Provisioner, for the purpose of communicating beef prices and calculating beef prices, with knowledge that the "Yellow Sheet" price is utilized by all major beef packers and slaughterers as a device to directly pass on to cattlemen the artificially low price set by the defendant food chains and other co-conspirators.

g. Utilize the National Association of Food Chains and others to develop and effectuate the aforesaid price-fixing conspiracy and attempt to monopolize.

VII.

FRAUDULENT CONCEALMENT

38. The defendants and co-conspirators repeatedly fraudulently concealed the existence of their combination and conspiracy and attempt to monopolize by various means used to avoid the detection thereof, including express denials on the public record under oath, of meeting together to discuss meat pricing, and as a result of such concealment the plaintiffs and members of MPIA and each of them had no knowledge and could not by the exercise of reasonable diligence have obtained the knowledge of the existence of the combination and conspiracy and attempt to monopolize until July 17, 1974, when it was disclosed in a trial at the United States District Court for the Northern District of California that the defendant co-conspirators did indeed meet together to discuss the pricing of beef.

39. By virtue of this fraudulent concealment, plaintiffs and members of MPIA and each of them, assert the tolling of the applicable statute or period of limitations affecting plaintiffs' rights to action herein.

VIII.

INJURY TO PLAINTIFFS

40. As a direct and proximate result of the unlawful acts and conduct of defendants and co-conspirators hereinbefore alleged, plaintiffs and members of MPIA have suffered injury to their business and property as follows:

a. Loss of and reduction in value of their respective businesses;

b. Loss and decrease in revenues and profits which would have otherwise been earned;

c. Incurrence of additional expenses which would otherwise have been avoided by the increased economies lost due to

the inhibition and limitation on expansion caused by depressed prices.

d. Loss of revenues measured by the difference between the artificially depressed price received by plaintiffs and the members of MPIA and the price they would have received had free market conditions existed.

41. The precise extent of the aforesaid damages are not presently known, and plaintiffs hereby pray leave of Court to amend this Complaint when said amount has been ascertained.

WHEREFORE, Plaintiffs pray that this Court adjudge and decree that:

1. Defendants and their co-conspirators have combined and conspired in restraint of trade and commerce as hereinabove described, and have combined and conspired to monopolize, have monopolized and attempted to monopolize the aforesaid trade and commerce in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2);

2. Plaintiffs and members of MPIA and each of them, have been injured as a direct and proximate result of the aforesaid violations of the antitrust laws of the United States;

3. Plaintiffs, on behalf of members of MPIA and each of them, recover their actual damages which must be trebled in accordance with the provisions of Section 4 of the Clayton Act (15 U.S.C. § 15) from the defendants who are jointly and severally liable therefor;

4. Plaintiffs and the members of MPIA, and each of them, recover the costs of suit together with attorneys' fees as provided by § 4 of the Clayton Act (15 U.S.C. § 15);

5. Defendants, and each of them, be permanently enjoined and restrained from each and every unlawful practice alleged herein as provided by Section 16 of the Clayton Act (15 U.S.C. § 26);

6. Plaintiffs and the members of MPIA be awarded such other and further relief as this Court may deem just and proper.

Dated this 16th day of August, 1977.

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